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In the
Supreme Court of the United States
OCTOBER TERM, 1968

No. 725

RAYMOND PATRIARCA, RONALD J. CASSESSO
and HENRY TAMELEO,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners pray that this Court grant rehearing of its order of January 13, 1969, denying their petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit in the above-entitled case as prayed for in their petition filed herein on November 12, 1968.

Further Questions Presented

1. Did the Government's guarantee of immunity from prosecution and the grant of other favors to an accomplice,

who was the sole witness to the *corpus delicti,* violate the standards of procedural fairness applicable to a so-called one-witness case so as to require the corrective exercise of this Court's supervisory powers?

2. Did the trial court's instructions to the jury that it is the Government's privilege not to indict a co-conspirator, given during the course of cross-examination by defense counsel, similarly violate the applicable standards of procedural fairness?

Reasons for Granting Rehearing and Issuing the Writ

Since the original petition was filed in this case, the Court of Appeals for the Fourth Circuit has had occasion to re-examine the so-called, common law "one witness rule" to the effect that the testimony of a single witness is generally sufficient to warrant conviction. In re-affirming the rule, that court added the qualification that a trial judge "has the power to refuse to permit a criminal case to go to the jury even though the single eyewitness testifies in positive terms . . ." *United States* v. *Levi,* 4th Cir., Dec. 19, 1968, *slip op.* at 6. Although the court wrote in the context of the possibly mistaken identification testimony of a single eyewitness, it also recognized the applicability of its holding to possible instances of "false swearing." *Id.* at 4.

Thus, given the one-witness rule as laid down in *Hoffa* v. *United States,* 385 U.S. 293 (1966), the Fourth Circuit has now raised the question whether, and to what extent, the federal appellate courts ought to exercise their supervisory powers to insure fairness in such cases. In the original petition for grant of a writ of certiorari, petitioners contended that the limits of fairness had been overstepped where the single-witness case against them had

been tried in an atmosphere of prejudicial publicity and where the prosecutor had deliberately thrown onto the scales his own integrity and that of non-witness agents of the FBI. Now, in the new light of the *Levi* case, suggesting that a higher standard of procedural fairness may be applicable to the single-witness case, petitioners wish to focus more sharply on the supervisory powers of the appellate courts in such cases and to offer further considerations in evaluating their claim that their convictions resulted from a combination of inequities which converted an otherwise close issue of credibility into easy victory for the prosecution.

The witness Baron testified on cross-examination that he had been told he would not be indicted if he testified before the grand jury (T.T. 185). Moreover, Agent Dennis Condon of the FBI testified at the trial that the United States Attorney, himself, had told Baron, in Condon's presence, that he would not be indicted (T.T. 311-312). On each occasion that this testimony was elicited, the trial court, *sua sponte,* instructed the jury that

> "it is the privilege of a United States Attorney not to indict a co-conspirator as a defendant" (T.T. 312, 185),

and again in the course of its formal charge to the jury, stated:

> "It is not fatal to the government's case, in a conspiracy case, if it chooses, which is its right, to name certain persons as co-conspirators and not name them as defendants." (T.T. 545).

As demonstrated in the original petition, the principal issue at the trial was the credibility of Baron, the Gov-

ernment's sole witness to the *corpus delicti.* Indeed, Mr. Baron's testimony was so highly motivated as to raise serious doubt whether any conviction resting exclusively on such testimony should stand. The situation was no less extreme than that in *Hoffa* v. *United States,* 385 U.S. 293 (1966), where Chief Justice Warren, in a dissenting opinion, was moved to say of the Government's chief witness, at 317-318:

> "Here, Edward Partin, a jailbird languishing in a Lousiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful as, an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apparent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the State and Federal Governments."

And, further, at 320:

> "This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding proces in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his testimony . . . For the affront to the quality and fairness of federal law enforcement which this case presents is sufficient to require an exercise of our supervisory powers."

It is true that federal courts have consistently held the

uncorroborated testimony of accomplices, or testimony made after promises and inducements, to be competent and admissible as evidence. See, *e.g.*, *United States* v. *Vida*, 370 F.2d 759, 767-768 (6th Cir. 1966) (and cases cited); *Diaz-Rosendo* v. *United States*, 357 F.2d 124, 130 (9th Cir. 1966). But misgiving arising even in the ordinary case from the danger of untrustworthinesss of such information is reflected in the concomitant rule that such testimony must be considered with great care and caution. As recently as last May, in *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court said with respect to the incriminations of an accomplice, at 136:

> "their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others."

The judicial reluctance to lay down a protective rule excluding such highly motivated testimony has meant that the only protection lies with the jury and whatever hesitancy it may have in believing such suspect testimony.

Accordingly, defendants are entitled to wide latitude in this respect with the jury. See *On Lee* v. *United States*, 343 U.S. 747 (1952), where the Court said at 757:

> "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant s entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."

Minimally defendants are entitled to preserve their position with the jury on this important point of credibility and not have it undercut by remarks of the court which have the tendency to support what is inherently suspect testimony. Whether or not the instructions were a correct statement of the law,[1] their timing was particularly injurious. By stating, just at the time when defense counsel was making the point as to the inducements held out to Baron to testify, and again in its charge, that the Government had the right to make such promises, the trial judge distracted the jury from the issue of Baron's credibility and obviated any hesitancy it otherwise would have had to believe Baron.

Concededly the trial court did include one sentence in its charge, and one sentence only, expressing the rule of caution. (T.T. 551). However, by consistently implying that such promises or inducements as had been made to Baron were perfectly proper and usual, the court effectively negatived the reason why the jury should be cautious. If juries are to be permitted to believe such testimony, because courts are unwilling to declare it incompetent as matter of law despite its inherent untrustworthiness, it is fundamentally unfair for a court to step in and buttress the Government's case by indicating that what was done by way of inducement was proper.

Moreover, by guaranteeing its chief witness immunity and bestowing other favors on him in exchange for his testimony, the Government seized an advantage wholly unavailable to the defendants, who had no similar means of wringing testimony from witnesses fearful of self-incrimination.

In dismissing these arguments, the Court of Appeals re-

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[1] Petitioners suggest that it is the "privilege" of the *Grand Jury*, not of the Government, to indict or not to indict.

lied on the fact that "defense counsel made no objection to the first *sua sponte* comment by the court nor to the same instruction in the final charge." See original Petition, pp. 17a-18a. The reason, of course, that no objection was made on the first occasion was that defense counsel did not wish to compound the damage by inviting further comment from the trial judge. On the second occasion, counsel realized that, short of a corrective instruction, the damage was now irreparable and, accordingly, entered their objection. Having once preserved their rights on the record, counsel saw nothing further to be gained by a futile objection to the same instruction during the course of the formal charge to the jury.

Where, as here, the government's case "rested entirely upon the uncorroborated testimony . . . of an accomplice and co-conspirator who had the strongest possible reasons to become a Goverment witness," it is incumbent upon this Court to "scrutinize any claimed error with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor." *United States* v. *Persico*, 305 F.2d 534, 536 (2d Cir. 1962).

In summary, petitioners concede that the testimony of a single witness, who is also an accomplice, may be sufficient to sustain a conviction. On the other hand, if the rule of the Fourth Circuit as laid down in *Levi* is correct, and assuming the continued vitality of the language in *Bruton*, then petitioners contend that they are entitled to the highest procedural protection of which our trial courts are capable. As demonstrated in their original Petition, the atmosphere in which the trial was held and the conduct of the prosecutor did nothing to contribute to the attainment of these high standards. As argued here, the guarantee of immunity and the grant of other favors, which defense counsel could not hope to match in obtaining wit-

nesses favorable to the defendant, and the intrusive instructions of the trial judge at critical points of cross-examination by defense counsel served further to enlarge the gap by which petitioners' trial fell short of the high standards of fairness applicable to the single-witness case.

This petition, therefore, presents a full range of issues typical of the case which rests entirely on the testimony of a single informer, including the means employed by the prosecutor to obtain the cooperation of the witness, the atmosphere of the trial, the conduct of the prosecutor and defense counsel, and the responsibilities of the trial court in instructing the jury and insuring procedural fairness. These issues, it is submitted, afford the Court a rare opportunity to enunciate and clarify the special rules of procedural fair play applicable to the single-witness case.

Conclusion

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the First Circuit.

Respectfully submitted,

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Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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